

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

29728

FILE:

B-215985

DATE: November 2, 1984**MATTER OF:** Daniels Manufacturing Corporation**DIGEST:**

1. Where conflicting statements of the protester and agency personnel are the only evidence regarding alleged advice given the protester, the protester has not met its burden of affirmatively proving that such advice was in fact given.
2. Bidders who rely upon oral advice from agency personnel after being expressly cautioned by the solicitation not to do so proceed at their own peril. It is unreasonable for a bidder to rely upon such advice when it conflicts with the express language of the solicitation.

Daniels Manufacturing Corporation protests the award of any contract for certain items under solicitation No. FEN-FM-A0212-A issued by the General Services Administration (GSA). Daniels complains that oral advice from the contracting officer as to packing requirements misled the firm into submitting an inappropriate bid, and accordingly requests that the solicitation for the items in question be canceled and reissued with clearly stated requirements. We deny the protest.

The procurement sought the acquisition of various quantities of tools used for the installation or removal of electrical contact connectors, with award to be made on an item basis. Daniels was the low responsive bidder for items 15, 16, and 17,^{1/} and second low for items 18 through 21 and item 54. The solicitation provided the following instructions for the items at issue:

^{1/}We fail to see Daniels' rationale for protesting these three items since it is the tentative awardee for them.

030490

"PACKAGING: One (1) installing [or removal] tool shall be preserved and packaged in a unit package designed to protect the item against damage during shipment, handling and storage.

PACKING: The unit packages shall be packed in a close-fitting fiberboard box, grade 200 minimum. The complete pack shall be in compliance with Uniform Freight Classification and the National Motor Freight Classification. The weight of the shipping container shall not exceed 65 pounds."

Prior to bid opening, Daniels sought clarification from the contracting officer as to the exact meaning of the instructions set forth above. The firm relates that it normally packages its tools in individual plastic vials or plastic bags for sale to its commercial customers, and was concerned that the instructions seemingly required that each tool had to be packaged in its own individual cardboard box. (Both GSA and Daniels apparently equate "fiberboard" with "cardboard.") Daniels' sales supervisor asserts that the contracting officer advised her that the instructions should be interpreted as requiring the use of cardboard boxes for individual packaging. Daniels states that it accordingly prepared its bid based on the cost of using cardboard boxes to package individual tools, making its bid prices higher than they would have been if the customary plastic packaging were to be used.

Daniels complains that it has since learned from the GSA that the packing of individual tools in cardboard boxes was not a solicitation requirement, and urges that the contracting officer's advice to its sales supervisor misled the firm into submitting an inappropriate bid. The firm believes that the solicitation for the items in question should, therefore, be canceled and reissued with clear packing instructions. We see no merit in the protest.

In our view, there is no doubt but that Daniels has simply misread the requirements of the solicitation. The first instruction, "PACKAGING," states that the individual tools are to be packaged in such a manner as to prevent damage, but does not specify any particular method or material to be used for this purpose. The second instruction, "PACKING," states that the unit packages are then to be packed in a fiberboard box for shipment, not, as Daniels has mistakenly assumed, that the unit packages themselves must be in the form of individual cardboard boxes. We think the meaning of this second instruction is obvious from the references to "the complete pack" and "the shipping container." We must conclude, therefore, that any confusion in this matter was initially engendered by Daniels' failure to read the subject instructions carefully.

Although the firm's sales supervisor has submitted a sworn statement that the contracting officer gave the advice in question, the contracting officer denies ever informing her that individual cardboard packaging was a requirement. Where such conflicting statements are the only evidence regarding alleged advice from agency personnel to the protester, the protester has failed to meet its burden of proving that such advice was in fact given. See Willis Baldwin Music Center, B-211707, Aug. 23, 1983, 83-2 CPD ¶ 240.

More importantly, we note that all bidders were cautioned at page 40 of the solicitation that:

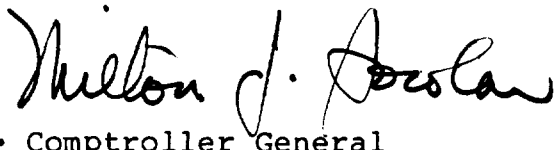
"No interpretation of any provision of this contract, including applicable specifications, shall be binding on the Government unless furnished or agreed to in writing by the contracting officer or his designated representative."

No interpretation of the instructions was ever made through the issuance of a written amendment, and we have held that bidders who rely upon oral advice from agency personnel after being cautioned in the solicitation not to do so proceed at their own peril. See Inventive Packaging Corporation, B-213439, Nov. 8, 1983, 83-2 CPD ¶ 544. We do not believe that the instructions were ambiguous to any

B-215985

degree, and, therefore, Daniels acted unreasonably in relying upon whatever oral advice was given by the contracting officer that conflicted with the express language of the solicitation. Id. We will only sustain a protest in such cases where it can be shown that, as a result of erroneous oral advice, effective competition was precluded. See Jensen Corporation, 60 Comp. Gen 543 (1981), 81-1 CPD ¶ 524. Since there were three responsive bidders for this procurement, and our examination of the bid abstract demonstrates that the prices submitted were reasonably competitive, even given the increase in Daniels' prices because of the firm's anticipated use of individual boxes, that exception is inapplicable here.

The protest is denied.

for 
Comptroller General
of the United States